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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1950

\_\_\_\_\_  
No. 30  
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THE UNITED STATES OF AMERICA,

*Appellant,*

vs.

UNITED STATES GYPSUM COMPANY, et al.,

*Appellees.*

**MEMORANDUM IN OPPOSITION TO MOTION BY  
THE UNITED STATES FOR AMENDMENT OF THIS  
COURT'S OPINION**

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December 18, 1950

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1950

THE UNITED STATES OF AMERICA,

*Appellant,*

*v.s.*

UNITED STATES GYPSUM COMPANY, *et al.*,

*Appellees.*

No. 30

**MEMORANDUM IN OPPOSITION TO MOTION BY  
THE UNITED STATES FOR AMENDMENT OF THIS  
COURT'S OPINION**

Appellant's motion seeks to amend the last paragraph on page 12 of the Court's slip opinion in the above-entitled case.

**I**

In the first place the motion should be stricken as attempting a post-decision procedure not provided for in the rules of this Court. It is in no sense a petition for a rehearing (Rule 33). It improperly presupposes an unwillingness on the part of the District Court to determine the details and form of the injunction in accordance with this Court's general suggestions, notwithstanding the expressed approval of that procedure (Slip Opinion 17).

## II

Furthermore, the motion is without merit. It deals solely with appellant's proposed subparagraphs (1) and (2) of Article V. In support of the motion reference is made to freight and delivery charges, sizes and minimum quantities, shipment and credit terms, all with respect to the fixing of the minimum price of patented gypsum board under the license agreements (Appellant's Motion, pp. 2-3). The Court's failure to refer specifically to subparagraphs (1) and (2) of Article V was not the result of inadvertence, as appellant's motion implies, but rather was for very sound reasons after a review of the arguments of both parties (Appellant's Br. pp. 40-41; Appellees' Br.\* pp. 43-45).

Appellees pointed out in their brief (p. 42) that the proposals to enjoin such specific practices paralleled similar provisions which appellant submitted to the District Court and which that court rejected. It covered the point, however, in a direct, simple and effective way by enjoining and restraining defendants from the further performance or enforcement of any of the provisions of the patent licenses, including any price bulletin issued thereunder. In this connection appellees urged that the District Court's method of handling the matter was entirely appropriate and should not be disturbed merely because the court did not choose to accept appellant's proposals.

Appellees also pointed out in their brief (p. 42) that the effort to include these specific practices was based upon matters which allegedly were included in the license bulletins

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\*Reference herein to Appellees' Brief will be to the brief filed on behalf of appellee United States Gypsum Company and certain individual appellees.

issued by licensor in the exercise of its reserved right to fix the minimum price at which the licensees might sell the patented board; that such details were necessary and inherent in the fixing of a price, as was illustrated by reference to the bulletins in the *General Electric* case and the pronouncements of the Bituminous Coal Authority in the coal industry. In this connection appellees called attention to their offers to prove that all provisions of the price bulletins with respect to the terms and conditions of sale had direct relation to the prices fixed by USG, and that such provisions were not promulgated for the purpose or with the effect of regimenting the industry, but solely for the purpose of defining the minimum price fixed by the licensor (Offer of Proof No. 51, R. 157). Appellees argued (Br. p. 43) that when the patent licenses and the price bulletins are stricken down and appellee companies enjoined from enforcing or performing any of the provisions of the licenses or bulletins, they have been effectively restrained and that there was no occasion for any such provisions as suggested by appellant.

Referring specifically to sub-paragraphs (1) and (2) of Article V, appellees, in their brief (p. 43), pointed out that appellant sought to support these provisions by referring to certain language of this Court in describing the method of pricing gypsum board (Appellant's Br. pp. 40-41). It appears very clearly that these matters all had to do only with fixing the price of gypsum board.

Appellees, referring particularly to subparagraphs (1) and (2) of Article V, further urged (Br. p. 44) that these provisions were highly objectionable and improper in that they attempted to place sweeping restrictions upon every activity of appellee companies in the manufacture, sale and



distribution of gypsum board, plaster and miscellaneous gypsum products; that the provisions were so vague and general that the appellee companies could not safely work under them in the ordinary conduct of their respective businesses. In this connection it was pointed out that these companies served the building industry and the methods of production and distribution of their products were largely influenced by the requirements of that industry. This was illustrated by the fact that the sizes of all building materials fastened to walls of buildings normally follow standard measurements in building construction, and that gypsum board must follow the same pattern.

With further reference to subparagraphs (1) and (2), appellees in their brief (p. 44), pointed out that although the provisions are made applicable to other gypsum products, they have reference only to charges limited to gypsum board. In this connection it was pointed out that the complaint specifically charged that appellees had restrained and monopolized the manufacture and distribution of gypsum products by concertedly standardizing gypsum board and its method of production, by limiting the manufacture of board to uniform methods, and by producing only uniform kinds of board for the purpose and with the effect of eliminating competition (Pars. 45(b), 77(a), 93; R. 10, 18-19, 25). It was further stated that there was no charge in the complaint of alleged efforts to standardize plaster and miscellaneous gypsum products (Br. p. 44).

Referring again to said subparagraphs (1) and (2), appellees, in their brief (p. 44), showed that the answers of appellees denied all of these charges (R. 284, 290) and that appellees offered to substantiate their contentions by proving that there was no agreement or understanding that the

production of open-edge board, No. 2 board or seconds would be discontinued; that each appellee was at all times free to make and sell such board; and that the discontinuance of the manufacture of open-edge board was due entirely to economic reasons (Offers of Proof Nos. 54, 55; R. 158).

It was further pointed out by appellees in their brief (p. 45) that on the prior appeal this Court, in considering the trial court's findings of fact as to these charges referred only to the elimination of open-edge board and was apparently largely influenced in its rejection of the findings by the royalty provision contained in the licenses (333 U. S. pp. 396-397). It was shown that appellees, however, offered to prove the economic reasons for those royalty provisions and to establish that they were not included for the purpose or with the effect of eliminating the production of open-edge board or any other type of board (Offer of Proof No. 46, R. 156). It was argued that there was nothing illegal *per se* in measuring royalties for the privilege of using licensor's patents on patent-free products. Appellees, in their brief (p. 45), with respect to the provisions of subparagraphs (1) and (2) of Article V, argued that under the circumstances it would obviously have been improper for the District Court to have attempted on appellant's motion for summary judgment to make an adjudication on its standardization charges and it did not purport to do so; that similarly it would be improper to include injunctive provisions which would be appropriate only if such charges had been proved. It was pointed out that the District Court, recognizing that the questions with respect to such standardization were confined to certain provisions of the license bulletins, took appropriate corrective measures by striking down the license

bulletins and enjoining any further performance or enforcement thereof.

This Court, in its last opinion in this case, in Section I thereof, said that it read the preliminary statement of the District Court to the decree and the summary decree itself as an adjudication of violation of the Sherman Act by the action in concert of the defendants through the fixed price licenses, accepting as true the underlying facts in defendants' proof by proffer. It was also said that the trial judges understood the summary judgment to be limited to that one undisputed question. The Court then said that that conclusion entitled the Government only to relief based on that finding and the proffered facts and that it was on that basis the Court examined the Government's objection to the decree.

We submit that there was no inadvertence, the question raised by appellant on its motion was fully presented by both parties and considered by the Court, and that appellant's motion should be denied.

Respectfully submitted,

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December 18, 1950

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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA

against

UNITED STATES GYPSUM COMPANY ET AL.

---

PLAINTIFF'S MEMORANDUM ON  
MOTION FOR SUMMARY JUDGMENT

---

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

-----  
UNITED STATES OF AMERICA,

Plaintiff

v.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants.  
-----

Civil Action No. 8017

PLAINTIFF'S MEMORANDUM ON MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

The complaint in this action was filed in 1940. It alleges in considerable detail that the defendants are engaged in an illegal combination in the manufacture and sale of gypsum products in violation of Sections 1, 2 and 3 of the Sherman Act.

Trial was begun in November 1943 and the Government rested its case on April 20, 1944. At the conclusion of the Government's case the defendants moved to dismiss under Rule 41(b) of Federal Rules of Civil Procedure. Arguments were concluded on the motion on May 31, 1944.

On June 15, 1946, this Court rendered an opinion holding that the motions should be granted and, on August 5, 1946, filed its findings of fact and conclusions of law and entered judgment dismissing the complaint.

On September 30, 1946, the Government filed its petition for appeal to the Supreme Court of the United States and the petition was allowed the same day.

1947, and on March 8, 1948, the Supreme Court rendered its opinion reversing the judgment of the District Court in granting the motion to dismiss.

On June 8, 1948, at the request of the Government, a conference was held between all attorneys interested in the case and the Judges designated to hear it to see whether or not a program could be adopted to speedily wind up and conclude the present action. At that time the Court stated that a motion for summary judgment would be entertained and requested the Government to file such a motion. The defendants were also requested to make a proffer of such proof as they thought they had a right to make; in addition, to make such contest as they might desire on the motion for summary judgment. Tr. 7789. The motion and proffer were to be made on or before June 15, 1948, and June 29, 1948, was set as the date for argument on the motion and proffer. Tr. 7797-8.

# I

## SUMMARY JUDGMENT

Rule 56(a) of the Federal Rules of Civil Procedure, as amended, provides that the plaintiff may, at any time after the expiration of 20 days from the commencement of the action, move for a summary judgment in his favor upon all or any part thereof. Obviously more than 20 days have elapsed since the present action was instituted.

Rule 56(c), as amended, provides that the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Rule 56(d) provides that if judgment on the motion is not rendered on the whole case, the court, by examining the pleadings and evidence before it and by questioning counsel, shall ascertain what material facts exist without substantial controversy and shall make



an order specifying the facts that appear without substantial controversy; directing such further proceedings as are just; and that the trial shall proceed upon the facts specified as controverted.

In Point II of this memorandum we will consider the pleadings, the evidence, and the admissions and will demonstrate that there is no material issue of fact for this Court to consider further; that the denials in the defendants' answers in reality amount to nothing more than denying the legal effects of admitted facts rather than denying the facts themselves.

Whether or not the plaintiff is entitled to judgment as a matter of law will be discussed in a separate Point.

## II

### THE FACTS

The material facts are set forth in detail in the complaint and answers; in the testimony of witnesses and exhibits offered at the trial; and also in the admissions of counsel made during the progress of the case. The material facts, as they are set forth in the complaint and answers, will be reviewed only briefly in this memorandum. For the convenience of the Court, a table of admissions appearing in the pleadings is attached hereto as an Appendix.

We do not propose to go into detail concerning the testimony of witnesses or the contents of exhibits and reargue what the meaning or force of the oral testimony is, or the proper construction to be placed on documents; that has already been done in our various memoranda heretofore submitted to the Court on the Motion to Dismiss, in the briefs on the appeal to the Supreme Court, and in the opinion of the Supreme Court on the appeal in this case. We feel very certain that this Court is thoroughly familiar with the testimony and exhibits and does not desire at this time any further particularization of those items. In so far as it is necessary to refer to the

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facts<sup>1/</sup> gleaned from the testimony and exhibits, we shall adopt the summary of them as made by the Supreme Court in its opinion of March 8, 1948, on the appeal in this case.<sup>2/</sup>

Paragraphs 1 to 43

There can be no doubt at all, based upon the admissions contained in the defendants' answers, that there is no disagreement upon the facts as set forth in the first 43 paragraphs of the complaint. That is to say, the description of the defendants and their relative positions in the gypsum industry are substantially correct; they all conduct a trade in gypsum products in interstate commerce; all (the defendants contend that two do not) conduct a commerce in such products between a state and the District of Columbia; and that the defendants are all the manufacturers of board in the United States in the so-called Eastern area. It is further agreed that gypsum, a raw product, is mined by all the defendant companies in various sections of the country and is sold by them in several forms, but principally as plaster, tile, and gypsum board; and finally, that the distribution of such products, principally by sale to dealers and to plaster manufacturers, is described in the complaint with substantial accuracy. However, paragraph 43, relating to jobbers, is not fully accepted. Since the subject of jobbers will be discussed later in this memorandum, our discussion on that issue will be deferred until that subject is reached.

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<sup>1/</sup> It will be recalled that this Court, in speaking about the facts of this case said that the basic or subsidiary facts are largely not in dispute. "The conflicting contentions of the parties on the issue of fact in the case are not as to what the evidence is, or as to what are the basic facts shown by the evidence; the dispute is as to the inferences to be drawn from the basic facts and, therefore, as to what the ultimate facts are." United States v. United States Gypsum Co., 67 F. Supp. 397, 459, 451.

<sup>2/</sup> Where "Slip opinion p. \_\_\_\_\_" is cited in this memorandum the reference will be to the Slip opinion in the case of United States v. United States Gypsum Co. et al., Supreme Court of the United States, No. 13 Oct. Term 1947, decided March 8, 1948.

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#### Paragraphs 44 to 46a

For the present, we shall defer discussing the allegations contained in the paragraphs listed above. For the most part, all the allegations of these paragraphs are conclusions drawn from facts which are contained in other paragraphs of the complaint, particularly paragraphs 90 to 104 and 108 to 111. We prefer to develop all facts chronologically before any attempt is made to discuss the conclusions which we draw from them.

#### Paragraphs 48 to 54, Inclusive

Paragraphs 48 to 54 of the complaint relate to the early patent litigation in the industry. There is no dispute between the parties with respect to the material facts alleged in these paragraphs, as the answers indicate, although USG does deny the conclusion we drew in paragraph 54 concerning a comprehensive plan for stabilizing prices in the gypsum industry. The Supreme Court's treatment of this branch of the case appears at page 4 to 6 of the Slip opinion; there that Court traces briefly the development of modern gypsum board and goes briefly into early patent infringement litigation between USG and other members of the board industry.

#### Paragraphs 55 to 63, Inclusive

The above paragraphs of the complaint have to do with the early license negotiations between Blagden and Avery and the activities of Griswold. It is a fair statement to say that, in the main, there is no dispute between the parties concerning the allegations of material facts appearing in these paragraphs.<sup>3/</sup> The Supreme Court summarized

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<sup>3/</sup> In paragraph 55 of the complaint we allege that conferences were held between Avery, Blagden and Griswold to consider compromises of patent litigation. We then state that the conclusions reached by the parties are set forth in paragraphs 56 to 58 of the complaint. In the answers these "conclusions" are denied. It is submitted that whether or not we drew the correct conclusions is immaterial; the material fact is whether or not: (a) conferences were held, and (b) were price-fixing patent licenses discussed. As to these, there can be no doubt at all. See Tr. 781-782.



the evidence relating to these paragraphs as follows:

Although the industry-wide network of patent licenses was not achieved until 1929, the government claims that the documentary exhibits show that the process of formulation of the plan began in 1925. On December 12, 1925, Augustus S. Blagden, president of Beaver, sent a memorandum to Sewell Avery, president of United States Gypsum. Beaver had been adjudged an infringer of the Utzman patent, and Blagden and Avery had negotiated terms for settling the suit. Blagden testified that Avery had offered to settle with Beaver by granting Beaver a license with a price-fixing limitation and provision that Beaver should pay damages for past infringement and acknowledge the validity of United States Gypsum's patents. In the memorandum Blagden analyzed in detail the consequences that would flow from five possible decisions of the Circuit Court of Appeals if the decree adjudging Beaver an infringer were appealed. Blagden noted that whether the court upheld or denied United States Gypsum's claim, United States Gypsum "would lose, perhaps irrevocably, its present opportunity to organize the industry and stabilize prices." The memorandum further pointed out that if the suit were settled on the terms offered by Avery, the result would be more favorable to United States Gypsum than any possible decision by the Court of Appeals. Beaver would accept a license and "would agree to use its best endeavors" to induce other manufacturers to accept similar licenses; if Beaver were successful in persuading other manufacturers to execute licenses, United States Gypsum could "maintain a lawful price control and avoid the necessity of a reduction by plaintiff [United States Gypsum] of current prices to meet competition." Under such circumstances, United States Gypsum "would be able to take a dominating position in the industry with an opportunity to control or at least to participate in the control of prices through legitimate means of patent licenses."

Although there is no proof that Avery approved Blagden's memorandum, Blagden did accept a license on the terms offered by Avery in July, 1926, and Blagden testified that he talked to a number of representatives from other companies and urged them to accept licenses from United States Gypsum. Frank J. Griswold, general manager of American Gypsum Company, also was active in promoting a scheme of industry-wide licensing. On May 12, 1926, Griswold wrote a letter to the president of American, stating that he had talked to Blagden, and added that "This matter will be discussed by all independent wall board manufacturers at a meeting in Chicago next Wednesday afternoon." Griswold concluded the letter with the statement: "According to the plans we have we figure that there is a possibility of us holding the price steady on wallboard for the next fourteen or fifteen years which means much to the industry."

Blagden and Griswold did not succeed in persuading other manufacturers to accept licenses in 1926. Universal accepted a license in September, 1926, but there is no evidence that Blagden and Griswold played any part in negotiating the settlement. [Slip opinion 6-8.]

Paragraphs 64 to 77, Inclusive

The above paragraphs set forth in detail the facts surrounding negotiations for licenses during the period from July 1927 to and including the May 1929 meeting. There is no disagreement between the parties as to the material facts alleged, although it is fair to state that there is some disagreement between the parties on some immaterial facts<sup>4/</sup> as well as to the conclusions the government drew from the facts. The Supreme Court reviewed the evidence relating to these paragraphs and summarized the facts as follows:

Griswold suggested to Avery that United States Gypsum offer a shorter term license, but Avery was unwilling to make such a concession. During 1927 Griswold and Blagden continued their negotiations. Griswold and Samuel M. Gloyd, owner of the Texas Cement Plaster Co., corresponded with each other in regard to the licensing proposal. When Griswold informed Gloyd that Atlantic Gypsum Co. had signed a long-term license with United States Gypsum, Gloyd replied that he would apply for a license right away. Previously Gloyd had been trying to secure a shorter term license. Gloyd and Atlantic both signed licenses similar to the original license granted to Beaver.

In January 1928 Certain-teed Products Corp. purchased the assets of Beaver. Certain-teed had previously been making open-edge board and selling it at lower prices than the closed-edge board manufactured by United States Gypsum and its licensees. Certain-teed refused to accept the license agreement of Beaver and United States Gypsum filed suit to compel Certain-teed to accept the license. Certain-teed posted a million dollar bond and commenced to make open-edge board at all Beaver plants. George M. Brown, president of Certain-teed, and Avery had several conferences at which they attempted to compose their differences, but without result. The government introduced in evidence a memorandum written by

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<sup>4/</sup> For instance, USC in paragraph 59 of its answer denies that the competition in 1928 caused a renewal of interest of board manufacturers in price stabilization; denies that Avery urged companies not licensees to reconsider his proposal for an industry-wide plan. These facts, if true, are immaterial; it would make no difference in result whether Avery urged the members of the industry to take out licenses or they urged Avery to grant them.

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Brown, dated March 1, 1928, in which Brown expressed confidence that he could make open-edge board and sell it in competition with United States Gypsum, and that he was afraid to sign up a license with price-fixing provisions because his competitors would grant secret rebates. Brown concluded that Certain-teed should answer the suit of United States Gypsum to enforce the Beaver license by claiming that the suit was filed not in the interest of royalties but for the sole purpose of trade domination and monopoly and price control. Brown concluded with the statement that United States Gypsum's "determination to gather in a monopoly, if possible, leads them to risk everything for such domination because of the big rewards possible, if they can succeed." Certain-teed did file an answer to the suit couched in those terms. Griswold testified that in a conversation with Brown in the following month Brown stated that he might possibly consider taking out a license if "all of the other manufacturers, or certain ones of them" took out a license. Griswold also wrote the president of American that he had had a conference with Brown at which Brown had said that "they were willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred per cent."

No settlement was reached between United States Gypsum and Certain-teed in 1928, and no other license agreements were signed. A meeting of representatives of the principal non-licensee manufacturers took place in October, and in November the board of directors of National adopted a resolution authorizing the officials of the company to enter into a license agreement. Besides Certain-teed and National, American, Ebsary, Niagara, and Kelley Plasterboard Company manufactured gypsum board but did not hold licenses from United States Gypsum.

The patent licenses in force at the beginning of 1929 provided that United States Gypsum could fix prices only during the term of the principal Utzman patent, which was scheduled to expire on August 6, 1929, although the remaining features of the agreements were to remain in force until the expiration of the last patent included under the license, which was in 1937. In negotiations in 1929, various defendants expressed concern over the possibility of an effective plan of price fixing in view of the imminent expiration of the Utzman patent. In a letter dated January 9, J. F. Haggerty, president of National, wrote Eugene Holland, president of Universal, asking his views as to possibility of continuing price control after the expiration of the Utzman patent. Holland in reply wrote as follows:

"You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the

Utzman patent expires next August is not a practical reason for continuing the conflict."

Holland also stated: "I am quite sure that Mr. Avery would not be interested in negotiating settlements unless everyone involved was included." In point of fact, Holland's interpretation of Avery's views was incorrect; several months later licenses were granted to four unlicensed manufacturers but not to American or Kelley. Other exhibits suggest that the prospective licensees were interested in accepting licenses at the same time. In his letter of January 9, Haggerty wrote as follows:

"The question now in my mind is whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company. It would seem to me that the chief value in a meeting would be to discuss that point."

On May 14, 1929, the board of directors of National held a meeting "for the purpose of discussing the license agreement submitted to all the manufacturers of gypsum products in the United States east of the Rocky Mountains by the United States Gypsum Co." The minutes of the meeting further quoted the chairman as saying that "he had been definitely informed that all other manufacturers of gypsum products east of the Rocky Mountains, except the American Gypsum Company, had agreed to sign the license contract in substantially the form as submitted to this Board." The board of directors authorized the execution of the proposed license contract.

Two days later National signed the license agreement. On the following day National sent a telegram to Avery as follows:

"Our contract signed and in mail Reeb [of Niagara] ready Stop We are working with Ebsary with hope of everybody being set by Saturday to justify your calling meeting all board makers Monday if you like."

On May 18 Avery dispatched identical telegrams to United States Gypsum's licensees, and to Certain-teed and Ebsary, as follows:

"Mr. Kling [of American] has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license."

On May 20 Avery wrote Gloyd of Texas Cement Plaster, a licensee since 1927, stating that although American was unwilling to accept a license, officers of Certain-teed, Niagara, Ebsary, and National had expressed themselves favorably "to this adjustment" and "it is not improbable that the matter may be closed at the meeting tomorrow or soon thereafter."

On the following day, a meeting of representatives of all but one of the licensed manufacturers, and all unlicensed manufacturers except American and Kelley, took place in Chicago. The three unlicensed manufacturers who were present--Certain-teed, Ebsary and Niagara--signed license agreements. [Slip opinion 8-12.]



Paragraphs 78 to 89, Inclusive

Under the so-called May 1929 agreements price fixing was to end with the expiration of the Utzman patent on August 6, 1929. It will be recalled that on the last day of the May 1929 meeting at the Palmer House, Chicago, Avery told those there assembled that USG had secured the American rights for the Bayer application for a patent on a process to make a "bubble-board." Roos, of USG, also had an application pending for a similar process. Avery, according to Lenci, explained that the inventions related to a light-weight board made by the introduction of soap foam in the slurry. Tr. 4160-4162. At this meeting, Avery made the further proposition that the industry take out licenses under the Roos and Bayer applications. Tr. 5029. The paragraphs listed above all relate to the transactions which took place on the last day of the May 1929 meeting until the industry was licensed under the November 1929 licenses.

It is fair to state that there is no disagreement on the material facts as alleged in the foregoing paragraphs except that there is some dispute, not material to a determination of the issues here involved, concerning the scope and use of certain patents.

The evidence on this branch of the case was reviewed by the Supreme Court and that Court summarized the evidence as follows:

At the same meeting, Avery explained to the licensees that United States Gypsum had acquired applications for a patent covering so-called "bubble board" and suggested that the licensees take out licenses under these applications. The applications covered a process for making gypsum board by introducing a soap foam in the gypsum slurry which would result in a lighter and cheaper board. Avery subsequently mailed proposed license agreements under the "bubble board" applications to the licensees. George M. Brown of Certain-teed, on June 4th acknowledged receipt of the license proposal in a non-committal reply, but composed a memorandum for his own files in which he commented that the savings resulting from taking a license would be doubtful, and then added:

"They would have a price control of our business, which might be to our advantage and might be

to our disadvantage in future. They should be just as anxious to have us use this as we should be to get it if there are to be the benefits that they anticipate in stabilizing the whole industry by making a uniform product and get away from the fierce warfares between different products like we have recently had. The saving is too slight to cause us very great worry even if never permitted to use it and the door will certainly be open later for its use if it has the merit that they believe it has. Under a contract sufficiently liberal, we should proceed at once."

On June 6th the licensees met again in Chicago to discuss the question of accepting a license under the "bubble board" patents. Shortly thereafter Certain-teed agreed to take out a license. National also agreed to accept a license; the minutes of the meeting of the board of directors on July 23 read in part as follows:

"The President stated that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry and has offered to license the entire Industry under the new method of manufacturing gypsum wallboard known as the 'Bubble System.' The license agreements submitted to each of the wallboard manufacturers contain price fixing clauses and under the agreements submitted the prices of wallboard would be fixed for the whole industry for the term of approximately seventeen years."

The board passed a resolution authorizing the executive committee to negotiate a license agreement, "provided that the United States Gypsum Company, by virtue of this agreement with this Corporation and with other manufacturers of gypsum wallboard, shall control the price of wallboard sold in the United States and its possessions."

Two days later another conference of licensees was held in Chicago. C. O. Brown, vice-president of Certain-teed, prepared a memorandum for George M. Brown, president of Certain-teed, describing what happened at that meeting. According to the memorandum, National and Universal were unwilling to accept "bubble board" licenses until they had settled their litigation over National's infringement of Universal's starch patent. That patent included process and product claims on wallboard made with starch. Brown noted that United States Gypsum was working on a proposal to combine the starch and "bubble board" processes; although such a combination would have technological advantages, Brown commented on the fact that the starch patent had already been issued "so a combination of the two systems would give a patent to work under in the manufacture and sale of Gypsum Wallboard immediately, whereas under only the Bubble process there would be an interim between August 6th and the date of issuance of the Bubble Patent where there would be

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no Patent control. There is, of course, considerable benefit to having Patent control continue without a break." Brown further noted that Avery was trying to work out a proposition with Holland to buy the starch patent or to license the industry under both processes.

Another meeting of licensees was held in Chicago on August 6, the day on which the Utzman patent expired. In a memorandum summarizing what happened at the meeting, C. O. Brown said that it had been agreed that Universal would assign the starch patent to United States Gypsum, and the latter company would issue a single license contract covering all patents and patent applications. Brown further reported that "all of the Independent Gypsum Companies are willing to sign on this basis" and that "The attorneys feel that such a contract would be exceptionally strong and price control could be maintained for the life of the Contract without difficulty." On August 27 the board of directors of National held a meeting at which the president was authorized to sign a license with United States Gypsum covering the "bubble board" and starch patents "provided that all the present licensees of the United States Gypsum Company enter into a similar license and provided further that in the judgment of the President such action will result in legal stabilization of the markets."

Soon thereafter, National, Certain-teed, Ebsary, Niagara and Atlantic executed licenses with United States Gypsum to become effective on the date when Universal's receiver transferred the starch patents to United States Gypsum. On November 5 the starch patents were assigned to United States Gypsum, and on the same date Universal also accepted a license. On November 25 American settled its litigation with United States Gypsum and accepted a license. All manufacturers of gypsum board were now licensed by United States Gypsum, except Kelley Plasterboard Co., and that concern executed a license in April of the following year. Texas Cement Plaster, a licensee under the Utzman patent, did not accept a license under the starch and "bubble board" patents until 1937 when the original license expired. Texas was thus free to sell board at any price from 1929 to 1937.

The contracts which became effective in November 1929 were in substantially identical terms. The license with Universal contained preferential royalty terms which were granted as consideration for the transfer of the starch patents; every other license (except that of Texas) provided that if the licensor should subsequently grant more favorable terms to any licensee (except Universal), the same more favorable terms would be granted to the first licensee. Each licensee agreed to pay as royalty a stipulated percentage on the selling price of "all plasterboard and gypsum wallboard of every kind" whether or not made by patented processes or embodying product claims. The contract covered fifty patents and seven patent applications, including the starch patent and the



"bubble board" applications; the contract was to run until the most junior patent expired. As two "bubble board" patents were issued in 1937, the licenses ran until 1954. The licensees agreed not to sell patented wallboard to manufacturing distributors unless United States Gypsum gave its consent as to each prospective purchaser. As in the previous contracts, United States Gypsum reserved the right to fix the minimum price at which each licensee sold wallboard embodying the licensor's patents, the licensor agreeing that such minimum price would be not greater than the price at which the licensor itself offered to sell. The more important provisions of the license to this litigation are set forth in an appendix to this opinion. Nothing has been omitted that appears to be significant on the issues considered. [Slip opinion 12-16.]

Paragraphs 113 to 120

The above paragraphs relate to the so-called metallized board and perforated lath agreements. Like the May and November 1929 agreements, these agreements also contained price-fixing clauses and prices have been fixed by USG under these agreements, and the answers of the defendants so admit.<sup>5/</sup> Unlike the May and November 1929 licenses, the entire industry did not accept licenses under these agreements. We do not detail the evidence relating to these issues because, like the issue under the topic "manufacturing distributors," to be discussed later, we feel that they are "not necessary for a decision" on the present motion. As a matter of precaution, however, we would want it understood that they are not abandoned. We feel that these issues can be satisfactorily taken care of in the final judgment.

Paragraphs 44 to 46a

Up to this point we have dealt with the occurrences and events of this case chronologically. We are now in a position to discuss those paragraphs of the complaint that draw conclusions from those facts.<sup>5a/</sup>

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5/ See defendants' answer to paragraphs 90-92 of the complaint.

5a/ This statement is not unqualifiedly correct. For instance, we discuss briefly in this portion of the memorandum paragraph 46a of the complaint although this paragraph is not a conclusion in any sense.

Paragraph 44 is the charging paragraph of the complaint; that is to say, that paragraph, substantially in the words of the statute, charges the defendants with violating Sections 1, 2 and 3 of the Sherman Act.

Paragraph 45 alleges that the defendants entered into and have carried out the combination and conspiracy for the purpose and effect of restraining, dominating and controlling the manufacture and distribution of gypsum board in the Eastern area. In substance, this paragraph generalizes what is elsewhere spelled out more fully in other paragraphs<sup>6/</sup> and states that the defendants:

- (a) Concertedly raised and fixed at non-competitive levels the price of gypsum board manufactured by them.<sup>7/</sup>
- (b) Concertedly standardized gypsum board and its method of production.
- (c) Concertedly raised and stabilized the prices of plaster and miscellaneous gypsum products.
- (d) Concertedly eliminated substantially all jobbers of gypsum products.
- (e) Concertedly coerced manufacturing distributors to resell at fixed prices.

Paragraph 46, in substance, states that the combination has been carried out, in part, by the use of patent license agreements and that these agreements are not proper patent license agreements reasonably designed to secure pecuniary reward for the monopoly but were for the illegal purposes described in paragraphs 44 and 45.

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<sup>6/</sup> See paragraphs 90-104 and 108-111 and the answers thereto. All of the foregoing paragraphs and answers are discussed later in this section except paragraphs 97 to 103, inclusive. Paragraph 97 relates to price fixing on open-edge board; the last two sentences in paragraph 98, as well as paragraphs 99 to 102, inclusive, relate to the fact that all or certain licensees did not use certain patents in the manufacture of board. The answers of the defendants deny these allegations. It is submitted that the issue raised by the answers is not material.

<sup>7/</sup> In the answers to paragraphs 90-92 it is admitted that USG fixed prices on board and enforced the price bulletins.

metallized and perforated lath patents are not valid. \*

In their answers the defendants deny the allegations of paragraphs 44 and 45; deny the allegations of paragraph 46 and "answer-in further," in substance, aver that they had the right to fix prices under the doctrine of the General Electric case<sup>8/</sup> (272 U. S. 476).

Under paragraph 46a this Court held that the government could not attack the validity of the patents in the present proceeding and dismissed certain portions of paragraph 46a of the complaint. On appeal this Court was reversed as to this point. Slip opinion 21. No answers have yet been filed to certain portions of this paragraph and consequently as to such matters issue has not yet been joined.<sup>8a/</sup>

Concerning (a) above--control of prices. All the patent license agreements here involved were substantially identical and, without exception, all provided for price control on board by USG. In his opening statement, counsel for USG stated:

We don't take the position that we didn't fix prices. Of course we did, we fixed prices of our competitors. [Tr. 783.]

Concerning price fixing on board, the Supreme Court said in its opinion:

The defendants did undertake to control prices and distribution in gypsum board. [Slip opinion 34.]

Concerning (b) above--standardization.<sup>9/</sup> The Supreme Court's opinion summarized the evidence relating to standardization of board.

<sup>8/</sup> This statement is not unqualifiedly correct since all defendants did not affirmatively so plead.

<sup>8a/</sup> For the purpose of this motion for summary judgment, of course, the Government does not press its claim of patent invalidity. If, however, this motion is denied, and it is decided that defense evidence will be heard, we reserve the right to introduce evidence as to invalidity.

<sup>9/</sup> See also paragraph 93 of the complaint and the answers thereto. The answers denied any agreement to standardize the product.



The government introduced evidence tending to show that the price of first quality wallboard was raised, that United States Gypsum standardized the type of board sold by requiring its licensees to sell No. 2 wallboard and seconds at the same price as standard wallboard, and standardized the methods of sale so that no licensee could offer more favorable terms to a customer than any other licensee.

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It is undisputed that after 1929 the defendants ceased to manufacture open-edge board; the government claims that production of the unpatented board was discontinued in order to protect the patented board from competition. Prior to 1929 open-edge board had sold at lower prices than closed-edge board, and the government's exhibits show that the officers of the corporate defendants realized that there could be no effective stabilization of prices on closed-edge board as long as open-edge board was sold without price control. The license agreements provided that royalties should be paid on the sales of all board sold, patented or unpatented, a provision which would tend to discourage the production of higher cost unpatented board. Although the government produced no evidence of any agreement between the defendants to eliminate production of open-edge board, corporate officers of the licensees testified that they anticipated that one result of industry-wide licensing would be the elimination of open-edge board. [Slip opinion 16, 19.]

When the Supreme Court discussed the findings of this Court relating to the question of standardization, it said:

In Findings 54, 56, 62, 63, 64, 65, 66, 89 and 90; the trial court made findings adverse to the government's claim that the defendants conspired to eliminate the production of open-edge board.<sup>15</sup> The tenor of those findings is that there was no agreement among the licensees to discontinue the production of open-edge board, although the trial court conceded that it might be "inferred" that each licensee did not expect to continue the manufacture of open-edge board. The provision in the license contracts that royalties should be paid on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board, and the testimony of the witnesses is ample to show that there was an understanding, if not a formal agreement, that only patented board would be sold. Such an arrangement in purpose and effect increased the area of the patent monopoly and is invalid. [Slip opinion 30, 31.]



Supreme Court also reviewed in some detail the Government's evidence relating to the stabilization of plaster and other gypsum products.

That Court summarized the evidence as follows:

To support the charge of stabilizing the price of unpatented plaster, the government cited letters written by officers of the corporate defendants showing that they anticipated that price stabilization in patented board would be accompanied with stabilization of all gypsum products. The trial court found that the price of plaster and miscellaneous gypsum products in fact did increase after 1929. The government charged that plaster prices were stabilized by requiring licensees who sold plaster together with patented board to sell plaster at prevailing prices. Board and plaster were usually sold together and the defendants claim that cutting of prices on plaster, in sales of the two together, operated in effect as a rebate on the price of board, and hence was legally subject to control. The government introduced in evidence a large number of complaints to Board Survey by licensees as to their competitors' failure to maintain prevailing prices on plaster. A bulletin provision forbidding rebates and allowances stated that a sale of board at posted prices would be in violation of the license if the licensee reduced the price of other products, and Board Survey in summarizing violations of bulletin terms revealed through audit of the licensees' books listed "Price concessions on other material in connection with board sales." [Slip opinion 20-21]

In considering this Court's findings relating to the stabilization of plaster prices, the Supreme Court said:

In Findings 73, 94-97,<sup>17</sup> the trial court dealt with the government's charge that the defendants had stabilized the price of unpatented gypsum products. Those findings held that there was no understanding or agreement that prices would be raised or fixed upon plaster or any unpatented product, that the bulletin provision prohibiting the reduction of price on unpatented products was designed to protect the price of patented board, and was not used to stabilize the price of unpatented materials. We reject all these findings as clearly erroneous. The bulletin provision and the complaints by licensees addressed to Board Survey convince us that the

17 (Footnote omitted)

<sup>10/</sup> See also paragraphs 96, 103 and 104 of the complaint and the answers thereto. The answers denied that plaster prices were fixed.

defendants attempted to stabilize plaster prices, and the fact that plaster prices were stabilized only when plaster was sold in conjunction with board appears to us to be immaterial. [Slip opinion 32-33.]

Concerning (d) above--elimination of jobbers.<sup>11/</sup> The Supreme Court summarized the evidence relating to the elimination of jobbers and did so in the following language:

The May 1929 licenses required licensees to obtain the consent of the licensor before selling board to manufacturing distributors or to jobbers and a price bulletin issued under those licenses allowed licensees to grant a 10% discount to both classes. The November 1929 licenses, however, eliminated the consent requirement with respect to jobbers, although it was retained with respect to manufacturing distributors.

The jobbers' discount was continued in bulletins issued under the later licenses until August 8, 1930, when United States Gypsum ordered that the discount be eliminated. Although jobbers could still buy board if they so desired, jobbers could remain in business only by selling to dealers at an advance over the bulletin prices. The court below found that some jobbers were able to remain in business by selling board in odd lots to dealers who did not wish to buy the minimum lot required in the price bulletins. The government points to the definition of "jobber" in the license agreements as "those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail," and points to uncontradicted testimony that jobbers as so defined were eliminated. [Slip opinion 19-20.]

When the Supreme Court came to pass upon the correctness of this Court's findings relating to jobbers, it did so as follows:

In Findings 75-79; 99-102,<sup>16</sup> the trial court considered the problem of jobbers. Those findings state, in effect, that the license agreements were not executed with the intent of eliminating jobbers, that the discontinuance of the jobbers' discount was an exercise by United States Gypsum of its right to establish a price for a patented product, and that complaints by licensees that other licensees had sold to jobbers at a discount did not establish concerted action to eliminate jobbers. We are un-

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16 (Footnote omitted)

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<sup>11/</sup> See also paragraphs 94 and 95 of the complaint and the answers thereto. The answers deny that jobbers were eliminated as the result of any agreement.

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dants entered into a common scheme to stabilize the industry, and since the elimination of jobbers was undertaken by United States Gypsum in furtherance of that purpose, a finding of specific intent as to each licensee is not necessary. Nor do we agree that the elimination of jobbers falls within the protection of the patent grant when the purpose, as here, is to prevent competition by uncontrolled resale prices. The inference we draw from the uncontradicted evidence is that the defendants acted in concert to eliminate an important class of jobbers. [Slip opinion 31-32.]

Concerning (c) above--manufacturing distributors.<sup>12/</sup> The Supreme

Court did not stop to set forth the evidence concerning the charge that the defendants fixed the resale prices of manufacturing distributors. On this branch of the case that Court said:

We do not stop to set forth the evidence upon which the government relied to support its charge that the defendants fixed prices at which manufacturing distributors sold gypsum board which they had purchased from United States Gypsum or its licensees, as that issue is not necessary for a decision of the case. [Slip opinion 20.]

While the Supreme Court did not say that the findings of this Court on the issue of fixing the resale price of manufacturing distributors were clearly erroneous, that Court did say:

The trial court made many other findings to which the government objected and yet to determine here whether each is erroneous is unnecessary.<sup>18</sup> Perhaps looked at in isolation some of the government's charges are not proven with that fullness that would justify our reversal of the finding of the District Court on the point. It may be that in the light of this opinion the District Court will conclude that many such findings are no longer significant in reaching its decision. As to others a different result will be required. Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling. [Slip opinion 33.]

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18 (Footnote omitted)

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<sup>12/</sup> See also paragraphs 108 to 111, inclusive of the complaint and the answers thereto. The answers denied that the resale prices of manufacturing distributors were fixed.



necessary for a decision of the case" we will not review here the evidence on it. That issue is not abandoned; it is a minor but not an unimportant issue in the case that can also satisfactorily be taken care of in the final judgment.

As heretofore indicated, the complaint alleges, in substance, that the defendants are and have been engaged in a continuing combination and conspiracy to organize the gypsum industry and stabilize prices by the use of numerous license agreements relating to patents owned by USG. The Supreme Court, in weighing the evidence upon this issue, reaffirmed its rule that where a prima facie conspiracy has been shown the declarations of one conspirator become binding upon his co-conspirators. [Slip opinion 22, 23.]

The Court there, painstakingly, as its opinion indicates, examined all the evidence in this case and examined it in considerable detail. No less than 20 pages of the Slip opinion are devoted to its summary of the evidence.

In its examination of the evidence on the issue as to whether or not the defendants were parties to a plan to blanket the industry under common price-fixing patent license agreements in order to organize the industry and stabilize prices, the Supreme Court went back to 1925 and step-by-step retraced the events as well as the activities of the principal characters of this case. For instance, the Blagden-Avery conference of 1925 was related; the activities of Griswold were noted; Gloyd's interest was observed; George M. Brown's attitude was noticed; the board manufacturers' meeting in Ebsary's hotel room was taken into account; the minutes of the board of directors of National were considered; the concern expressed by various defendants, "over the possibility of an effective plan of price fixing in view of the imminent expiration of the Utzman patent," was considered; the Haggerty-Holland correspondence was noticed; the telegrams between Baker and Avery as well as between Avery and other

defendants that were sent prior to the May 1929 meeting, were taken into account; the meeting at the Palmer House and Avery's invitation to the industry on the last day of the meeting to accept licenses, did not go unobserved; the licensee meetings during the summer of 1929 when the members of the industry met and traded out the terms of the November 1929 licenses were gone into in minute detail; the form of the license agreements--most favored nation clause, royalty on the selling price of "all plaster board - - - - - of every kind," and the price-fixing clause - - - - - was considered; the pricing of No. 2 board and seconds out of the market was noticed; the voluminous price bulletins and the terms thereof were scrutinized; the industry's acceptance of, "directions for distribution of product as corollary to price control," was noted; the establishment of Board Survey, its activities, and the complaints made to it, were all considered; the discontinuance by all defendants of the manufacture of open-edge and No. 2 board was taken into account; the competitive conditions prior to 1929 were commented upon; the "consent clause" to sell to manufacturing distributors only with the written consent of USG, was taken into account; and finally, the stabilization of plaster prices was noted.

After noting all of the activities which we have briefly summarized above, the Supreme Court said:

The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us, these facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensor and the licensees to fix prices and regulate operations in the gypsum board industry. [Slip opinion 23, 24.] [Emphasis ours.]

When the Supreme Court passed upon the correctness of Finding 118, that "the evidence fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices," it said:

Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case

rule otherwise than that Finding 118 is clearly erroneous. [Slip opinion 30.]

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From what has heretofore been summarized it is apparent that the defendants have violated the Sherman Act just as charged in the complaint. Furthermore, it is apparent that on the basis of the complaint and answers alone there is no genuine issue of fact between the parties as to any material facts, for it is obvious, we submit, that the denials contained in the answers do not deny the facts; instead, the denials deny the legal effects of the facts.<sup>13/</sup> The Supreme Court decided that the legal effects were such as to violate the Sherman Act. Of course, when the uncontradicted evidence is considered (and parenthetically we add that it never can be contradicted) we have in this case facts which "are overwhelming evidence of a plan of the licensor and the licensees to fix prices and regulate operations in the gypsum board industry." [Slip opinion 23, 24.]

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<sup>13/</sup> Cf. Footnote 1, page 4.



NO GENUINE ISSUE OF FACT REMAINS IN THIS CASE WITH RESPECT TO ANY MATERIAL FACT ESSENTIAL TO MAKE OUT A COMBINATION OR CONSPIRACY IN RESTRAINT OF TRADE AND A MONOPOLY OF TRADE OR COMMERCE UNDER THE SHERMAN ACT AND THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD ACCORDINGLY BE GRANTED.

1. Summary Judgment May Be Granted When no Genuine Issue of Fact Material to the Case is Presented.

Under Rule 56(c), as amended, it is provided that summary judgment shall be granted forthwith if the pleadings, depositions and admissions on file show that there is no genuine issue as to any material fact. The issue must be genuine, not a feigned issue; it must be one on a material fact and not on one that is immaterial; and, although there may be pro forma denials in the pleadings, that circumstance will not defeat the motion if the denial goes to the effect of admitted facts rather than denying the facts themselves, and the effects of the facts are determined to be unlawful. In Miller v. Miller, 122 F. 2d 209, (1941, C. of A.D.C.) the Court of Appeals for the District of Columbia sets forth the purpose of Rule 56 and states the general principles governing its application. Justice Edgerton there said:

The purpose of this rule "is to dispose of cases where there is no genuine issue of fact, even though an issue may be raised by the pleadings." However, "The court is not authorized to try the issue, but is to determine whether an issue is to be tried." "To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force." (Page 212; emphasis ours.)

2. The Supreme Court Has Decided That in Order to Make Out a Violation of the Sherman Act in This Case "It Would be Sufficient to Show That the Defendants, Constituting All Former Competitors in an Entire Industry, Had Acted in Concert to Restrain Commerce in



(a) - The General Electric case has no application to an industry-wide combination.

It is unnecessary to discuss each step by which the Supreme Court, unanimously, reached the above statement of the law of this case. It will be noted, however, that by so holding it completely disposed of the defendants' principal contention throughout the trial. It simply is not true, as the defendants have contended, that since a licensor may under the General Electric case, control the prices of a single licensee, he therefore may issue a plurality of licenses containing price fixing clauses and thus bring an entire industry under price control.

That point was made very clear when the Court goes on to say that its conclusion follows "despite the assumed legality of each separate patent license, for it is familiar doctrine that lawful acts may become unlawful when taken in concert." Slip opinion 35. In other words the gist of the offense is concerted action in restraint of trade and it is wholly immaterial that the various acts of the parties, when viewed alone, are quite lawful. <sup>14/</sup> Uniform prices maintained by all erstwhile

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<sup>14/</sup> At the oral argument in the Supreme Court the following colloquy ensued:

"Justice Frankfurter: That raises the question of whether that which is being done singly, being lawfully done, may by being done in combination be and create a different problem.

"Mr. Bromley: Of course, it does.

"Justice Frankfurter: That is this problem.

"Mr. Bromley: That is this problem, except we do not have here a combination which, by agreement, limits the freedom of action of the licensee; because he did not have any freedom of action. He could not sell these goods unless he took a license; he was excluded under the patent.

"Justice Frankfurter: I think that argument proves too much, Mr. Bromley; that does not take account of the Carbide doctrine, does it? Because he is a licensee of a patent, he does not have any freedom to get that patent, and yet it does invalidate a license that says if you take this you must also sell non-patented goods.

"Mr. Bromley: Yes, but does that not go outside -- that little factor go outside the protection of the patent?

(Continued next page)

as those maintained where no patents are involved.

It should next be pointed out that there is no question in this case as to the "motives" or the "good faith" of the defendants. Since the General Electric case, as just shown, does not afford protection to industry-wide patent price control under valid licenses, it is unnecessary to inquire whether in this case the defendants acted in "bad faith," or whether their license agreements were "sham." And, of course, it has always been recognized that the defendants could not by showing their "good faith" be exonerated for conduct otherwise in violation of the Sherman Act. The point was made sufficiently clear in Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20, 49, where the court said:

The law is its own measure of right and wrong, of what it permits, or forbids, and the judgments of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results. United States v. Trans-Missouri Freight Asso., 116 U. S. 290; Armour Packing Co. v. United States, 209 U. S. 56, 62.

It must further be pointed out that the rewards obtained by the defendants by reason of the price control and industry regulation in this case were not regarded by the Supreme Court as constituting the reward to which a patentee is "normally and reasonably" entitled under doctrine of the General Electric case. Mr. Justice Reed stated the point without any qualification whatever: "The rewards which flow to

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(continuation of footnote 14/

"Justice Frankfurter: I am saying that it does. All I was saying is the fact that he could not compel a license of a patent does not give us the answer of the restriction that followed from that absence of freedom until he actually gets the patent.

"Mr. Bromley: Yes, sir. Then, may I approach this in this direction?"

"Justice Frankfurter: I do not think logic, abstract logic, is going to solve this kind of a problem." (Transcript of oral argument, Supreme Court, November 14, 1947, pages 134-135.)

through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly."

Slip opinion 35.

It is submitted that, from this brief consideration of the Supreme Court's opinion, the General Electric case must be said to have no application whatever to the circumstances of this case. In the words of Mr. Justice Reed: "The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case." As a matter of fact, in United States v. Line Material Co., 333 U. S. 287, 304, decided on the same day as this case, Mr. Justice Reed's language there indicates plainly a further limitation on the doctrine of the General Electric case for, referring to that case he states:

On that assumption where a conspiracy to restrain trade or an effort to monopolize is not involved, a patentee may license another to make and vend the patented device with a provision that the licensee's sale price shall be fixed. [Emphasis ours.]

Of course, where you have, as in this case, an admittedly industry-wide combination, it can hardly be said that this arrangement can be considered lawful.

And finally, were there any doubt remaining on the truth of this proposition it was set at rest by the action of the Supreme Court in denying the defendants' petition for rehearing. There they argued, as they do here, that a "plurality of licenses, even industry-wide, with price limitation, even under a plan by a patentee and its competitors to accomplish such licensing, is within the rule of the General Electric case." Defendants' Petition for Rehearing, page 15.<sup>15/</sup>

In denying defendants' petition the Court must be taken as having denied the truth of this argument, as above set forth. The General Electric decision, therefore, has no application to the facts of this case.

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<sup>15/</sup> See also pages 1-9 of the same petition where the same argument is advanced.



all former competitors in the gypsum industry, have acted in concert to restrain trade and monopolize commerce in order to organize the industry and stabilize prices.

It will be comparatively simple to demonstrate that there is no genuine issue of fact on any of the material elements of this case. To begin with, it is admitted that the defendants are all the manufacturers of gypsum board in the United States in the area east of the Rocky Mountains. It is admitted that prior to May 23, 1929, they competed at the price, quality and service level in the sale of board; since then there has been no competition at those levels. Indeed, it is admitted that vigorous competition, described as a "price war," existed in the industry until May 1929. It is further admitted that on or about May 23, 1929, the entire industry (except American and Kelley) had taken out patent licenses from USG; that these licenses were substantially identical and all provided for price control; and that USG in fact issued price bulletins at this time which in the main were followed by both licensor and licensees. Indeed, counsel for USG in his opening statement, said (Tr. 783): "We don't take the position that we didn't fix prices. Of course we did, we fixed prices of our competitors."

At the meeting of licensees on May 23, 1929, it is further admitted, Mr. Avery offered to all licensees a license under the "bubble board" patent applications. And, since it is admitted that Mr. Avery at all times insisted upon a price control provision in the USG licenses, it is an admitted fact that these licenses were also understood by all to provide for price control. They in fact were drafted to provide for price control and in November 1929 became effective throughout the entire industry (except for Kelley and Texas). Since that time until July 8, 1941, it is an admitted fact that gypsum board prices have been fixed by USG.

Thus far there can be no question that there is no genuine issue of fact in the case. It would be possible further to show that

gypsum industry which constitute unlawful restraints of trade. For example, there is no question that USG issued the bulletin of August 8, 1930, Government Exhibit No. 430, leveling off the price of board to jobbers with that applying in case of sales to dealers. There is also no question that jobbers, as the term is defined in the November 1929 agreements, have been eliminated from the industry. Again there is no question but USG fixed the price of open-edge boards, No. 2 board, and seconds at the same amount as regular Sheetrock and that subsequently open-edge board, No. 2 board, and seconds have been eliminated from the market. Also, there is no real question that the bulletin provisions concerning rebates have operated to stabilize the price of plaster and other unpatented gypsum products sold in conjunction with board. There admittedly has been policing of the licensees by USG and its licensees through Board Survey. These, and many other practices stand in the record admitted, and, being done in concert, constitute traditional violations of the Sherman Act.

For the purposes of the present motion, however, it is not necessary to rely on these traditional violations<sup>15a/</sup> in order that the plaintiff may have judgment. As the Supreme Court said: "Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices." Slip opinion 35. In other words, it is enough to show that the defendants, being erstwhile competitors, have acted in concert to stabilize prices in an entire industry. This, we submit, has been shown beyond any doubt at all.

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<sup>15a/</sup> It will be understood, of course, that we do not abandon these traditional abuses.

by the Supreme Court herein whether they so acted prior or subsequent to the signing of the licenses.

In their argument before this Court at the conference of June 8, 1948, it was substantially admitted that the defendants, being erstwhile competitors, have fixed prices of gypsum board in the gypsum industry since at least November 1929. The point was made, however, that it was not admitted that the defendants acted in concert in taking out their licenses. Tr. 7762. It was insisted that each licensee acted independently and that unless it were an admitted fact that the defendants acted in concert at this time the plaintiff would not be entitled to summary judgment. Tr. 7763.

Of course, as counsel for USG further admitted, the point is one which "draws a very fine line indeed." Tr. 7761. It is submitted that the line does not exist at all. Of course it is true, as the Supreme Court pointed out in the Interstate Circuit case, that in order to show concert of action the defendants must at some time be shown to have acted according to a common plan. As the Court put it (306 U. S. 208, 227): "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." [Emphasis ours.]

It will be noted that in the Interstate Circuit case the Court did not specify that the adherence to the plan must be at any given time. And, in the Masonite case, the lower court found expressly that (316 U. S. 265, 275):

. . . in negotiating and entering into the first agreements, each appellee, other than Masonite, acted independently of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others.

In dealing with these findings, the Supreme Court said (p. 275):



appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that, as the arrangement continued, each became familiar with its purpose and scope. Here, as in Interstate Circuit, Inc. v. United States, 306 U. S. 208, 226, "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." The circumstances surrounding the making of the 1936 agreements and the joinder in 1937 of the two other companies leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking. As this Court stated in the Interstate Circuit case (p. 22): "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

In the present case there is no question whatever that defendants acted concertedly on and after the licenses were executed to carry out their provisions. For instance, in his opening statement counsel for USG stated that in March 1931, USG called a meeting of licensees to meet with it and at this meeting requested that the licensees cooperate with it in the enforcement of the licenses; and furthermore, that USG created Board Survey as the agency to which a licensee could complain about another licensee's non-compliance. Tr. 739-740. As it was there stated (Tr. 740): "Of course it was policing, of course it was trying to keep the licensees in line, but trying to keep them in line only under the licenses. . . ."

Again, the meeting of October 17, 1932, furnishes one of the clearest illustrations of the defendants acting in concert to carry out the provisions of the licenses. This meeting was attended by all the then existing licensees under the November 1929 licenses, Tr. 4297. Various license violations were discussed, Tr. 4304-4316, and concerning these violations, MacLeish was emphatic that: "if the situation did not improve there were only three things to do: either cancel the licenses; or for USG to institute damage suits against the licensees; or to eliminate the price control feature from the licenses." Tr. 4300.

it is admitted that the licenses were not cancelled; USG did not commence damage suits; and that the price control feature of the licenses was not eliminated. Tr. 4300-4303. There can be no question whatever that from and after this meeting all the licensees were fully advised of the purpose of the licensing plan to fix prices, and gave their adherence to it. Moreover, it is admitted that what took place at this meeting was true for following this testimony the following colloquy ensued, Tr. 4328-4329:

"Justice Stephens: - - - I don't understand that there is any dispute about what he said. Do you dispute the witness' statement, Mr. Bromley, as to what went on at this meeting?

"Mr. Bromley: No, your Honor, I think what he said is substantially true.

"Justice Stephens: You may, I assume, wish to qualify or modify his statements through cross-examination, but there isn't any denial that such a meeting was held.

"Mr. Bromley: No.

"Justice Stephens: Or that Mr. MacLeish was there?

"Mr. Bromley: No, your Honor.

"Justice Stephens: And that he discussed these topics.

"Mr. Bromley: Oh no, there isn't any denial of that."

It is submitted that the meeting of October 17, 1932, is sufficient illustration alone to show that the defendants have acted in concert to fix prices and regulate the gypsum industry. Coupled with the other facts above described it would suffice to make out a case upon which summary judgment could be based. But, in addition, it is submitted that the record also shows conclusively that the defendants were fully advised of the plan to have industry-wide price control even before they signed the November 1929 licenses and that by signing the licenses they gave their adherence to it.

At the meeting of licensees on May 23, 1929, it is admitted that Avery offered to license everyone under the "bubble board" patents. On

the day, previously, it is further admitted, USG passed out its first industry-wide price bulletins. During the summer of 1929 it is admitted that a number of meetings were held between USG and some or all of its licensees at which the "bubble board" patent applications and later the "starch" patents were discussed. Since Mr. Avery insisted throughout on price control in all licenses it would be inconceivable that each licensee was not fully aware of the plan that everyone take out licenses. Of course they each acted independently in determining to go along with the others, but there is no question that they did all go along and that "the necessary consequence" of their action, since it was carried out, was "restraint of interstate commerce."

During the course of the argument before the Supreme Court the Justices were careful to question counsel for the defendants as to what knowledge each licensee had concerning the fact that the entire industry might be licensed. In the course of the discussion the following colloquy took place:

"Justice Reed: What I am interested in knowing is whether the licensee, the middle licensee, with Blagden on one side, and the last licensee on the other, knew of the other licensees?

"Mr. Bromley: I think, all, of course, as they took licenses, knew of the existing licenses.

"Justice Reed: Was there any provision that this was a standard license or were there more favorable terms?

"Mr. Bromley: Yes, sir, there was a most favored nation clause.

"Justice Reed: Do you recall what that is or where that is?

"Mr. Bromley: They can find it in a minute . . . .

"Justice Reed: Also, if there is such favored nation clause, each of them must know that it is participating in the general plan.

"Mr. Bromley: Yes, sir; but if the end result is legal how can their knowledge render it illegal in the end result; even with a multiplicity of licenses it is legal, and I do not understand that there is anything in ~~Masonite~~ which is contrary because the agreements in Masonite, contrary to the agreements here, were unlawful. [Transcript of oral argument, Supreme Court, November 14, 1947, pages 132-133: Emphasis ours.]



Concerning the November 1929 licenses the following colloquy ensued:

"Justice Black: What happened after the expiration of the patent?

"Mr. Bromley: After the expiration of the patent Mr. Avery called these licensees together and said, "Now, I have an entirely new development." Before the license expired he called them in and said, "I have an entirely new development, the Roos foam or bubble board invention, I want you to look at it, I offer it to you, you can have it if you want it." [Transcript of oral argument, Supreme Court, November 14, 1947, page 144. Emphasis ours.]

It is against this background that the Supreme Court said:

... We think that the industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a prima facie case of conspiracy. Each licensee, as is shown by the uncontradicted references to the meetings and discussion that were preliminary to the execution of the licenses could not have failed to be aware of the intention of United States Gypsum and the other licensees to make the arrangements for licenses industry wide. The license agreements themselves, on their face, showed this purpose. The licensor was to fix minimum prices binding both on itself and its licensees; the royalty was to be measured by a percentage of the value of all gypsum products, patented or unpatented; the license could not be transferred without the licensor's consent; the licensee opened its books of accounts to the licensor; the licensee was protected against competition with more favorable licenses and there was a cancellation clause for failure to live up to the arrangements. See the Appendix. Furthermore, the bulletins gave directions to the industry as to its prices and methods of operation in unmistakable terms. The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us, these facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensors and licensees to fix prices and regulate operations in the gypsum board industry. [Slip opinion 23-24.]

It is submitted that upon the foregoing facts it must be held that the defendants have acted in concert. It is not essential, of course, that there was any "agreement" <sup>16/</sup> to sign licenses. It is

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<sup>16/</sup> The contra of this proposition is the same argument that the defendants advanced before this Court at the conference of June 8, 1948; it is part of the argument the defendants used in their petition  
(Continued next page)

enough that each knew of a common plan or course of action the necessary consequences of which would be price control and restraint of trade, and gave their adherence to it.

(d) It is not essential to a Sherman Act case to show that defendants "intended" to accomplish the restraints that were subsequently carried out.

At various times in the course of this case it has been urged by the defendants herein that defendants have not been shown to have "intended" the various restraints of trade which have taken place. It has been repeatedly asserted, for example, the defendants have not been shown to have intended to eliminate "jobbers" when they signed the license agreements. In defendants' proffer of proof, submitted pursuant to this Court's order of June 8, 1948, it is apparent that the chief type of testimony to be offered by them in defense will consist of statements from responsible officials of the defendant companies that they did not "intend" by their actions to impose unreasonable trade restraints or to monopolize the gypsum industry.

The complete answer to this contention is that proof of express intention is not required in Sherman Act cases. Perhaps the best known expression of the rule occurs in Patten v. United States, 226 U. S. 525, where the Court said (p. 543):

Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-trust Act is designed to prevent. See Swift & Co. v. United States, 196 U. S. 375; 396-400; Loewe v. Lawlor, 208 U. S. 274; Standard Oil Co. v. United States, 221 U. S. 1; United States v.

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(Continued from preceding page)

for rehearing which the Supreme Court, without opinion, denied. See pages 10-16 of the defendants' petition for rehearing.

American Tobacco Co., 221 U. S. 106. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 243; United States v. Reading Co., 226 U. S. 324, 370.

An even clearer statement of the rule appears in the recent case of United States v. Griffith, 68 Sup. Ct. Rep. 941, where Mr. Justice Douglas said (p. 944):

It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. United States v. Ratten, 226 U. S. 525, 543; United States v. Masonite Corp., 316 U. S. 265, 275. To require a greater showing would cripple the Act. As stated in United States v. Aluminum Co. of America, 148 F. 2d 416, 432, "no monopolist monopolizes unconscious of what he is doing." Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act.



(e) The Line Material case is not inconsistent with the Gypsum case, but affords a further ground upon which this case may be decided.

Both the Line Material case, 333 U.S. 287, and the Gypsum case, 333 U.S. 364, were decided by the Supreme Court upon the same day. It would be more than strange, therefore, if the first could now be used to overrule or limit the second, as the defendants have attempted to urge. The refusal of the Supreme Court to grant defendants' petition for rehearing, however, completely disposes of that argument. The Line Material case does not give support to defendants' contention that the rule of the General Electric case should be expanded to sanction a "plurality of licenses" with industry-wide price control.

As pointed out above, Mr. Justice Reed stated explicitly (333 U.S. 287 at 304) that the General Electric case now "continues as a precedent" only in the single situation between licensor and licensee, where no charge of conspiracy is made. And this Court's attention is further called to the language of the Supreme Court in the later case of United States v. Paramount Pictures, 333 U.S. \_\_\_, 68 Sup. Ct. 915, 923, where such a situation is described as being "wholly academic." In other words, there can be no argument today that the doctrine of the General Electric case applies to industry-wide licensing with price control in the circumstances of this case.

No doubt, therefore, the Supreme Court could have decided the Line Material case on exactly the same ground as it did the Gypsum case. It chose, however, to put its decision upon a different ground. Price control in the Line case was based upon a combination of patents, one being the dominant Lemmon patent held by Southern States Equipment Co., and the other the Schultz patent held by Line Material Co. As the arrangement was carried out Southern licensed Line under the Lemmon patent and authorized it to grant sub-licenses. Then, by a series of licenses as in this case, Line brought the whole drop-out fuse industry under licenses with price control.

In condemning this scheme, Mr. Justice Reed said (at 311):

Nothing in the patent statute specifically gives a right to fix the price at which a licensee may vend the patented article. 35 U.S.C. §§ 40, 47. While the General Electric case holds that a patentee may, under certain conditions, lawfully control the price the licensee of his several patents may charge for the patented device, no case of this Court has construed the patent and anti-monopoly statutes to permit separate owners of separate patents by cross-licenses or other arrangements to fix the prices to be charged by them and their licensees for their respective products. [Emphasis ours.]

The Court then generalized its condemnation as follows:

Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his licensees. The struggle for profit is less acute. Even when, as here, the devices are not commercially competitive because the subservient patent cannot be practiced without consent of the dominant, the statement holds good. The stimulus to seek competitive inventions is reduced by the mutually advantageous price-fixing arrangement. \* \* \* The merging of the benefits of price fixing under the patents restrains trade in violation of the Sherman Act in the same way as would the fixing of prices between producers of nonpatentable goods. [Emphasis ours.]

Thus, quite apart from the holding in the Gypsum case, two or more competing patents may not be combined for the purpose or with the effect of obtaining price control on the products manufactured under any of the patents. In the present case, it is submitted, that is exactly what the defendants did during the summer of 1929. At that time USG took over the "starch" patents from Universal, combined them with the Roos "foam" applications, and then proceeded to license the industry under both with price control.

Moreover, there is no genuine question of fact involved. It is admitted that USG at the meeting on May 23, 1929, offered to license all of its licensees under the "foam" patent, with price control. It is admitted by defendants that during the summer of 1929 Universal charged USG with infringing the "starch" patents. It is admitted that many meetings were held during the summer between USG and its licensees in order to work out new licenses, always with price control,

since Avery insisted on that from first to last. Finally, it is a fact as appears from the patents themselves that both the Haggerty "starch" patent and the Reos "foam" application had to do with a process for making a "porous" or "cellular" board. They both made a light-weight board having, among other claimed virtues, insulating qualities.

It would seem to follow, without real dispute, therefore, that the "foam" and "starch" patents were "competitive non-infringing" patents, as described by Mr. Justice Reed in the Line Material case. The fact that here it was arranged for USG to buy the "starch" patents, with a license back to Universal, instead of to take a cross-license, is obviously a matter of detail of no significance. Here, as in the Line Material case, there was a "merging of the benefits of price fixing under the patents" and the result is equally contrary to the provisions and purposes of the Sherman Act.

The Line Material case, therefore, not only does not overrule or limit the Gypsum decision of the Supreme Court, but actually affords a separate and independent reason why the General Electric case has no application to the facts of this case.

3. The Defendants Have Achieved a Monopoly of the Gypsum Board Industry in Violation of Section 2 of the Sherman Act.

In addition to being engaged in a continuing conspiracy in violation of Section 1 of the Sherman Act, as just discussed, the defendants have likewise monopolized the manufacture and sale of gypsum board in violation of Section 2 of the Act. It is submitted, moreover, that there exists no genuine issue of fact on any material point, and that, accordingly, the Court should grant the motion for summary judgment.

Since 1929, or for nearly 20 years, it is an admitted fact that the defendants have controlled the sale of substantially all gypsum board manufactured and sold in the area east of the Rocky Mountains. There is no question here, as in United States v. Aluminum Co. of America, 148 F. 2d 416, whether the combination controlled a sufficient



amount of commerce to constitute a monopoly. In fact, as the Supreme Court held in United States v. Yellow Cab Co., 332 U.S. 218, a monopoly may have to do with any "appreciable" part of commerce. Here there admittedly was control not only of all manufacture, but of all distribution.

Nor does the General Electric case or the fact that patents are involved, afford any defense to the charge of monopoly. Control of an entire industry when obtained as here by the abuse of the patent privilege affords the plainest possible illustration of an unlawfully acquired monopoly. In this connection, the Court's attention is called to United States v. Paramount Pictures, 334 U.S. \_\_\_, 68 Sup. Ct. 915, where the Court found a monopoly to exist notwithstanding the defense that the defendants were protected by the copyright laws. The Court there said (p. 922):

We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is illegal per se. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129; United States v. Masonite Corporation, supra. We recently held in United States v. United States Gypsum Co., 333 U.S. \_\_\_, 68 S. Ct. 525, that even patentees could not regiment an entire industry by licenses containing price-fixing agreements. What was said there is adequate to bar defendants, through their horizontal conspiracy, from fixing prices for the exhibition of films in the movie industry. Certainly the rights of the copyright owner are no greater than those of the patentee.

And later, when speaking of the vertical combination between producers and exhibitors, the Court said (p. 923):

We stated in United States v. United States Gypsum Co., supra, at page \_\_\_ of 333 U.S., at page 545 of 68 S. Ct., that "The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly." The same is true of the rewards of the copyright owners and their licensees in the present case. For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic, as the District Court pointed out. It is, therefore, plain that United States v. General Electric


Co., supra, as applied in the patent cases, affords no haven to the defendants in this case. For a copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses. See Interstate Circuit v. United States, supra, 306 U.S. at page 230, 59 S. Ct. at page 476, 83 L. Ed. 610.

Again, as discussed supra in the case of conspiracy to restrain trade under Section 1 of the Sherman Act, it is not necessary to show by separate evidence that defendants entertained a "purpose" to create an industry-wide monopoly, either before they embarked upon their activities or at any other time. The same is true of "intent"; men are presumed to intend the natural consequences of their acts, and will not be heard to say the contrary. The Supreme Court in United States v. Paramount Pictures, 334 U.S. \_\_\_, 68 S. Ct. 915, at 937, put the matter this way:

... we pointed out in United States v. Griffith, 333 U.S. \_\_\_, 68 S. Ct. 941, that "specific intent" is not necessary to establish a "purpose or intent" to create a monopoly but that the requisite "purpose or intent" is present if monopoly results as a necessary consequence of what was done.

In other words, the Sherman Act is directed at substance, i.e., the existing conspiracy or monopoly. The means by which it was brought about may have been lawful; there may be no formal proof of specific intent or purpose; but, if a conspiracy or monopoly exists, that is enough. Moreover, the law is clear as to what constitutes a monopoly. One of the best expressions upon the point is that of Mr. Justice Burton in American Tobacco Co. v. United States, 328 U.S. 781, where he said (p. 811):

A combination may be one in restraint of interstate trade or commerce or to monopolize a part of such trade or commerce in violation of the Sherman Act; although such restraint or monopoly may not have been actually attempted to any harmful extent. See United States v. International Harvester Co., 214 F. 937, id., 274 U.S. 693. The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so.

 United States v. American Tobacco Co., 164 F. 700, 721, remanded for further proceedings, 221 U.S. 106, 188. "It is undoubtedly true . . . that trade and commerce are 'monopolized' within the meaning of the federal statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient." United States v. Patten, 187 F. 664, 672, reversed on other grounds 226 U.S. 525. Cf. North American Co. v. S.E.C., 327 U.S. 686.

The American Tobacco Co. case was limited to the narrow question whether actual exclusion of competitors is necessary to the crime of monopolization under Section 2 of the Sherman Act. The Supreme Court held in the negative. Of course the present case is very much clearer. For example, not only have the defendants had the "power to raise prices," but it is admitted that for 19 years they have fixed uniform and non-competitive prices, i.e., monopoly prices. The circumstance that USG may in each case have set the price without consultation with its licensees is beside the point. As the Supreme Court said in the Masonite case, 316 U.S. 265, at 276: "Prices are fixed when they are agreed upon."

The record, it is submitted, is equally clear upon the power of the defendants "to exclude competition." In the first place, the Court will remember that in the years 1925-1929, when there was active competition, the gypsum board industry was expanding. From 1929 on, however, the reverse has been true and many companies which were thus active have gone out of business. Niagara, Universal and Atlantic were bought out. Oakfield, a manufacturing distributor and potential board manufacturer, was in effect forced to sell out to National. During the pendency of this present case, Texas has sold its plant to Celotex. These are all steps toward the greater concentration and monopolization of the gypsum business.

With respect to distribution the record of exclusion is entirely clear. Jobbers, as defined by the defendants, have admittedly been eliminated. Manufacturing distributors have been permitted to purchase



board from licensees only with the consent of USG. The "power to exclude" such distributors, whether or not it has been used, or whether USG ever "intended" to use it, is without question. And, finally, it is also an admitted fact that the Cardiff Gypsum Company has been concertedly refused the right to buy gypsum board on the same basis as other plaster manufacturers.

This record of actual exercise of monopoly power, both to fix prices throughout the industry and to regulate the distribution of products to exclude competition is overwhelming proof that defendants have violated Section 2 of the Sherman Act. The Supreme Court put the matter this way (Slip opinion, p. 34):

Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences. United States v. National Lead Co., 332 U.S. 319, 327; Hartford-Empire Co. v. United States, 323 U.S. 386, 406; Standard Oil Co. v. United States, 283 U.S. 163, 170-74; Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20. The defendants did undertake to control prices and distribution in gypsum board. They did utilize an agency, Board Survey, Inc., to make this control effective. Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 465. Such facts, together with the other indicia of intent to monopolize the gypsum board industry, hereinbefore detailed as to the agreements, bulletins and declarations, convinces us that the defendants violated the Sherman Act.

There is, we submit, no genuine issue of fact on any of the necessary elements of the charges contained in the complaint. Matters yet in dispute, if any, concern details having to do with the relief requested, and can be resolved at some future hearing before the Court.

#### CONCLUSION

For the reasons herein specified, it is respectfully submitted that the motion for summary judgment should be granted. It is further respectfully requested that if the motion for summary judgment is not

granted upon the whole case, this Court shall make an order specifying the facts that appear without substantial controversy, and that the trial shall proceed only upon the facts specified as controverted.

June 29, 1948.

Respectfully submitted,

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Special Assistants to the Attorney General.

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## Appendix

In the various answers filed by the defendants, admissions are made concerning certain allegations of the complaint. Some of these admissions are listed, viz:

### As to Paragraph 2 of the Complaint:

Each defendant (except Newark and Texas) admits that it transacts business in the District of Columbia and is engaged in a continuous course of business in selling and delivering gypsum products, including gypsum board, to dealers with the District of Columbia.

Paragraph 2 of the USG answer, typical of the various answers, states:

... that said United States Gypsum Company is engaged in a continuous course of selling and delivering gypsum products, including gypsum board and plaster, to dealers within the District of Columbia and is engaged in soliciting, through salesmen, orders for gypsum products from dealers within the District of Columbia, and in promoting the sale of said gypsum products in the District of Columbia by advertising in the District of Columbia . . . .

### As to Paragraph 3 of the Complaint:

USG and Celotex admit that they maintain sales offices within the District of Columbia. The admission of Celotex is as follows:

... admits that it maintains a sales office within the District of Columbia and maintains salesmen for the solicitation of business in said gypsum products as set forth in Paragraph 2 of this answer, . . . .  
[Paragraph 3 answer of Celotex. Bror G. Dahlberg adopts answer of Celotex.]

### As to Paragraphs 5, 6, 7, 8, 9, and 10 of the Complaint:

The defendants named in the above paragraphs admit the averments therein contained. [Answer of USG and National, paragraph 6; answer of Certain-teed and Celotex, paragraphs 5, 6, 7, 8, 9, and 10; answer of Newark, paragraphs 5, 6, and 10; Ebsary answer is silent.]

### As to Paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19 of the Complaint:

USG, Avery, and Knode admit the allegations of Paragraphs 12, 13, and 14. [Paragraphs 7 and 8 of USG answer.]

National and Baker admit the allegations of paragraphs 12 and 15. [Paragraphs 8 and 10 of National answer.]



Certain-teed and Celotex admit the allegation of paragraphs 12, 13, 14, 15, 16 (as corrected), 17, 18, and 19. [See same paragraphs in Certain-teed and Celotex answers.]

Ebsary and Frederick Ebsary admit the allegations of the above paragraphs. [No denial in answer.]

Newark and Frederick Tompkins admit the allegations of paragraphs 12 and 19. [See paragraphs 5 and 6 of Newark answer.]

Texas and Samuel Gloyd admit paragraph 11. [See paragraphs designated "5 to 19" of Texas answer.]

As to Paragraph 20 of the Complaint:

Admit, with respect to the averments contained in Paragraph 20 of the Complaint, that the defendant companies are engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at plants at various points throughout the United States so located as to have a readily accessible source of supply of raw gypsum rock, either through mining or quarrying operations in the immediate vicinity of the plant or through water transportation of the crude gypsum from the source of supply located at points distant from the plant; . . . U. S. G. sells a part of said gypsum products in interstate commerce to distributors within the States east of the Rocky Mountains. . . and sells a part of said gypsum products in commerce between the States and the District of Columbia. . . . [Paragraph 10, answer of U. S. G., Avery, and Knode.]

. . . the defendant, NATIONAL, is engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at plants located throughout the United States and allege that said defendant sells said products to dealers within the States east of the Rocky Mountains and in commerce between the States and the District of Columbia to dealers within the District of Columbia. [Paragraph 12 answer of National and Melvin H. Baker.]

. . . admits that each of the defendant companies is engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at one or more plants located throughout the United States, that each of the defendant companies sells a portion of the gypsum products so manufactured in interstate commerce in some or all of the States comprised within the Eastern area, that each of the defendant companies, with the exception of Texas, sells a portion of such gypsum products in commerce between the States and the District of Columbia to retail dealers in building products within the District of Columbia, and that the defendant companies manufacture and sell approximately 100% of all gypsum board, . . . [Paragraph 20 answer of Certain-teed and Hartley; paragraph 20 answer of Celotex and Dahlberg.]

. . . that the defendant companies are engaged in the manufacture of gypsum products at plants located at various points throughout the United States, and sell gypsum products to dealers and distributors in interstate commerce, and some of them in commerce between the states and the District of Columbia; admit that EBSARY operates but one manufacturing plant, and that its sales in the Eastern area of gypsum board manufactured by it amounted to approximately \$670,000.00 in 1939; admit that EBSARY has been engaged in the manufacture of gypsum blocks since 1911 and has been engaged in the manufacture of plaster since 1918, and has, since 1928, manufactured gypsum board; admit that EBSARY entered into license agreements with U.S.G. as set forth in Exhibits "3" and "6" annexed to the complaint: . . . [Paragraph 2, answer of Ebsary.]

Admit that Newark operates a gypsum board plant at Kearny, New Jersey, and a gypsum plaster mill at Newark, New Jersey, that U.S. G. and National operate plants in the United States and that Newark sells gypsum products manufactured by it in interstate commerce, . . . [Paragraph 7, answer of Newark.]

. . . admits he is engaged in the manufacture of gypsum products, with a plant at Plasterco, Texas, and sells said products principally east of the Rocky Mountains and west of the Allegheny Mountains in the southwestern states, . . . [Paragraph 20, answer of Gloyd, d/b/a Texas Cement Plaster Co.]

As to Paragraphs 21, 22, and 23 of the Complaint:

All the defendants (except National as to paragraph 23) admit the allegations of this paragraph. Each defendant (except Ebsary) says the description of paragraph 21 is not complete. Sales value and percentages mentioned in these paragraphs are not admitted.

[USG answer, paragraphs 11, 12, 13; National answer, paragraphs 13 and 14; Certain-teed, Celotex, and Texas answers paragraphs 21, 22, and 23; Newark answer, paragraphs 8, 9, 10.]

As to Paragraphs 24 and 25 of the Complaint:

All the defendants (except National and Newark as to both paragraphs 24 and 25, and Ebsary and Texas, as to paragraph 24) admit the averments of the first three sentences of paragraph 24 and the first four sentences of paragraph 25. USG admits the averments of the sixth sentence of paragraph 24. [USG answer, paragraphs 14 and 15;

Certain-teed and Celotex answers, paragraphs 24 and 25; Texas answer, paragraph 25.]

As to Paragraph 26 of the Complaint:

All the defendants admit that this paragraph describes gypsum board in a general way. [USG and National answers, paragraph 16; Certain-teed, Celotex, and Texas answers, paragraph 26; Ebsary answer, paragraph 4.]

As to Paragraphs 27, 28, 29 of the Complaint:

All the defendants substantially admit the allegation of these paragraphs. [USG and National answers, paragraphs 17, 18, and 19; Certain-teed, Celotex, and Texas answers, paragraphs 27, 28, and 29; Ebsary answer, paragraph 4; Newark answer, paragraphs 5, 12, and 13.]

As to Paragraph 30 of the Complaint:

The definitions contained herein are adopted by all defendants. [USG and National answers, paragraph 20; Certain-teed, Celotex, and Texas answers, paragraph 30.]

As to Paragraphs 31 and 32 of the Complaint:

USG admits that it was incorporated in 1901 and from that date to the present time it has been the largest producer of gypsum board and plaster in the United States, and that it produced and sold in 1929, approximately 55 per cent of all gypsum board sold in the Eastern area. USG further admits that in 1939 its sales in the Eastern area of gypsum board manufactured by it amounted to approximately \$10,600,000. USG also admits that during the 20 years preceding the filing of the complaint, it acquired the gypsum plants of 8 other producers, including the Niagara Gypsum Company which, at the date of its acquisition in 1929, had been engaged in the production of gypsum plaster and plaster board for 10 years and gypsum wallboard for 6 or 7 years. Likewise, USG admits that it now operates 16 plants in the Eastern area and that gypsum board is produced in 13 of said plants. USG further admits that since 1925 it has expanded



into fields of other allied building materials and is now a manufacturer of all the building material products listed in paragraph 32 of the complaint, except insulation wool. [USG answer, paragraphs 21 and 22.]

As to Paragraphs 33 to 38, inclusive, of the Complaint:

The allegations contained in paragraph 33 (except that National produces gypsum board at 8 plants instead of 7); paragraphs 34 and 35 (except that Certain-teed produces no paper); paragraph 36 (except the percentages used therein); paragraph 37, and 38 are admitted respectively by defendants National, Certain-teed Celotex, Ebsary, Newark, and Texas. [National answer, paragraph 22; Certain-teed answer, paragraph 35; Celotex answer, 36 and 37; Newark answer, paragraphs 15 and 16; Ebsary answer, paragraph 2; Texas answer, paragraphs 36 and 38.]

As to Paragraph 39 of the Complaint:

... admit that said defendant, United States Gypsum Company, sells most of the gypsum board and plaster manufactured by it to retail building material dealers located throughout the Eastern area, ... admit that since 1929 and for many years prior thereto defendant, United States Gypsum Company, has generally refrained from selling said gypsum products direct to contractors, ... [USG answer, paragraph 29.]

Certain-teed, Ebsary, Newark, (except as to last sentence) and Texas admit the allegations of paragraph 39 of the complaint. [Certain-teed answer, paragraph 39; Ebsary answer, paragraph 5; Newark answer, paragraph 17; Texas answer, paragraph 39.]

Celotex admits the allegations contained in the first two sentences of paragraph 39 but, in its admission, uses the word "some," instead of "most" as is used in the first sentence of the complaint. [Celotex answer, paragraph 39.]

As to Paragraph 40 of the Complaint:

The allegations of the first sentence of paragraph 40 of the complaint are substantially admitted by all the defendants except

Ebsary. As to the second sentence of paragraph 40, the defendants limit their answers to state, that although board is often transported in mixed cars or trucks of board, plaster, and miscellaneous gypsum products, straight carload and truck loads of board are frequently sold. [USG answer, paragraph 30; National answer, paragraph 25; Certain-teed, Celotex, and Texas answers, paragraph 40; Newark answer, paragraph 18.]

As To Paragraph 41 of the Complaint:

All the defendants admit the allegation of this paragraph of the complaint. [USG answer, paragraph 31; National answer, paragraph 26; Certain-teed, Celotex and Texas answers, paragraph 41; Ebsary answer, paragraph 5; Newark answer, paragraph 19.]

As to Paragraphs 48 to 53, inclusive, of the Complaint:

The defendants USG, Certain-teed, and Celotex (except as to validity of patents) admit the allegations of these paragraphs of the complaint. [USG answer, paragraphs 37, 38, 39, 40, and 41; Certain-teed and Celotex answers, paragraphs 48 to 53, inclusive.]

As to Paragraphs 64 and 65 of the Complaint:

USG admits that a copy of the Beaver Products Company license agreement is set forth in the complaint as Exhibit 2 in appendix. Furthermore, that the licenses to Universal, Atlantic, and Texas (with certain immaterial exceptions as to Atlantic and Texas) were similar to the Beaver license. [USG answer, paragraphs 49 and 50.]

As to Paragraphs 68 and 69 of the Complaint:

USG and Certain-teed admit that late in 1926 Certain-teed commenced to manufacture an open-edge board and sold it at a price below the closed-edge board. Furthermore they admit that the introduction of open-edge board on the market presented a competitive problem and that American, National, and Niagara companies sold a second-grade board at about the same price as that of open-edge board. [USG answer, paragraphs 53 and 54; Certain-teed answer, paragraphs 68 and 69.]

As to Paragraphs 70 and 71 of the Complaint:

USG and Certain-teed admit that Certain-teed acquired Beaver in 1928 and that USG refused to modify the Beaver license and that Certain-teed refused to assume the Beaver license. Admits that in 1928 American, Ebsary, and Niagara commenced manufacturing an open-edge board. [USG answer, paragraphs 55 and 56; Certain-teed answer, paragraphs 70 and 71.]

As to Paragraph 80 of the Complaint:

USG admits that copies of U. S. patent, No. 1, 230, 297 to Hite and U. S. patent, No. 1, 500, 452 to Haggerty, are set forth as Exhibits 4 and 5 of the appendix to the complaint. [USG answer, paragraph 65.]

As to Paragraph 85 of the Complaint:

USG admits that after it had agreed to acquire the Hite and Haggerty patents, it subsequently entered into license agreements with National, Certain-teed, Universal, Atlantic, Ebsary, American, and Kelley. [USG answer, paragraph 70.]

As to Paragraph 88 of the Complaint:

USG admits the averments of this paragraph of the complaint except that USG threatened to sue Texas for infringement of the starch patent.

As to Paragraphs 90 and 91 of the Complaint:

USG admits that it has fixed prices and has issued to its licensees minimum price bulletins, and that certain minimum price bulletins are set forth in Exhibit 7 in the appendix to the complaint. [USG answer, paragraphs 75 and 76.]

As to Paragraph 92 of the Complaint:

USG admits that through Board Survey it has enforced the terms and provisions of the price bulletins. [USG answer, paragraph 77.]



As to Paragraph 98 of the Complaint:

USG admits that copies of the U. S. patents, Nos. 2,017,022, 2,079,338, and 2,080,009 are set forth in the appendix to complaint as Exhibits 8, 9, and 10 respectively. [USG answer, paragraph 81.]

As to Paragraphs 113 and 114 of the Complaint:

USG admits that in 1934 it offered to grant to each of its licensees a license to manufacture and sell metallized board embodying the inventions and improvements set forth and claimed in patents and patent rights owned by USG and that such a license agreement was entered into with USG by American, Atlantic, Certain-teed, Ebsary, Kelley, National, and Universal. USG admits that the copy of the metallized board license agreement entered into with Ebsary, which is set forth as Exhibit 11 in the appendix to the complaint, is substantially identical with each of the metallized board licenses entered into with the other licensees. USG further admits that throughout the period from the execution of said license agreements to the date of filing the present complaint USG has determined the minimum price at which each licensee might sell gypsum board. [USG answer, paragraphs 94 and 95.]

As to Paragraphs 115, 116, 117, 118, and 120 of the Complaint:

All the defendants (except Newark) admit that early in 1936, USG offered to license its licensees to manufacture and sell perforated lath. [USG answer, paragraph 96; National answer, paragraph 83; Certain-teed, Celotex, and Texas answers, paragraph 115; Ebsary answer contains no denial.] The defendants USG, Certain-teed, Celotex, and Ebsary admit that the license agreement reserved to USG the right to fix prices for said lath. [USG answer, paragraph 97; Certain-teed, Celotex answers, paragraph 116; Ebsary answer, paragraph 20] USG admits that American, Certain-teed, Ebsary, and Kelley entered into similar agreements with USG and that a copy of said agreement is set forth in the appendix to the

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complaint as Exhibit 12. [USG answer, paragraph 98.] USG admits that from the date of said license agreement until May 1938 the minimum price so fixed was at a differential above the price of straight lath. [USG answer, paragraph 99.] USG further admits that the validity of their perforated lath patent has not been passed on by any court of the United States. [USG answer, paragraph 101.]